SUPERIOR COURT
OF THE STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: March 7, 2006
Decided: July 31, 2006

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Re: *State v. Thomas Albanese, ID# 0501000212*

Dear Counsel:

This decides Mr. Albanese's motion for a new trial. As you know, a jury convicted him of felony driving under the influence. Now, Defendant is pressing two issues he raised before.

First, as you recall, on the morning of trial, the State produced a "surprise" witness, a fifteen year old boy, who testified, over objection, that he saw

Defendant behind the wheel. That was the only direct evidence putting Defendant in actual physical control of the vehicle.

Second, also over Defendant's objection, the court charged the jury on "actual physical control." The indictment did not charge Defendant in those words. It alleged that Defendant "did drive." Moreover, the State's opening statement told the jury: "The true issue is who was driving the vehicle? Who was operating the vehicle. . . .?" The State's evidence that Defendant was driving, however, turned out to be much weaker than its evidence showing actual physical control. Therefore, Defendant's motion re-emphasizes the ways Defendant allegedly was prejudiced by the mid-trial, "shift in theory of the prosecution."

I.

The court has reviewed the motion and it has carefully reviewed its extensive, contemporaneous trial notes. With one exception, discussed below, the court is satisfied that its bench rulings made before the State's opening statement, before and after lunch on the trial's first day, and before closing arguments on the second day, adequately address the issues.

In summary, Defendant may have been surprised by the State's eyewitness. The State, however, was not required to reveal the witness before trial. Moreover, in discovery, the State turned over the police reports. Although they were redacted, they mention:

> [Redacted name] lives in the residence across from where the conclusion of the incident occurred. [Redacted name] advised that his son told him that a man was assaulting two females outside so he went out and observed Thomas Albanese striking both [redacted] and [redacted name] advised that he attempted to intervene at which time Albanese became belligerent with him.

Thus, Defendant was on notice that at least two people living across from the scene were potential eyewitnesses. The teenager's testimony about what he did not see, i.e. who was driving, did not hurt the defense. Nevertheless, his testimony that he saw Defendant behind the wheel was unshakable and incriminating. His testimony, therefore, was not exculpatory as Defendant argued.

Also, in summary, the State's reliance on the statutory "actual physical control" language was appropriate under the circumstances.[1] To appreciate this, it helps to know the trial's back-story.

II.

According to the police, the eyewitness's parents called because they thought a domestic incident was happening in a car, on the street in front of their home. The police arrived believing they were responding to a domestic assault, but by then no one was in the car. Only after they began speaking with the car's occupants did the police begin to suspect Defendant had been driving while under the influence. Basically, at the scene, Defendant's wife told the police that she was struggling for the ignition keys because she did not want Defendant driving drunk again. Therefore, the police and the prosecutors, in turn, expected to prove that Defendant was driving under the influence.

As the trial approached, however, Defendant's wife recanted and the State announced on the morning of trial that it would not call her. Instead, the State relied on the teenage eyewitness, who saw Defendant in actual physical control but did not see him driving. Thus, as Defendant argues, the State did shift its theory,

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[1] *Bodner v. State*, 752 A.2d 1169 (Del. 2000) ("The term "drive" is now defined as including "driving, operating or having actual physical control of a vehicle." A person who is driving also operates and has actual physical control of the vehicle. A person can operate a vehicle without driving it but not without having actual physical control. A person can have actual physical control, however, without either operating or driving the vehicle.").

falling back from driving to actual physical control.

III.

Defendant's motion amplifies a point made by Defendant on the morning of trial. When Defendant objected to the State's surprise witness, defense counsel insisted that if he had known about the eyewitness, he would have visited the scene. That would have enabled him to cross-examine the eyewitness better.

Attached to Defendant's motion are photographs of the scene. Primarily, they show two things. First, one photograph allegedly taken from the shoulder of the roadway and depicting the witness's home, shows a large evergreen tree apparently blocking much of the view from the house. Based on that photograph, Defendant now argues:

> It is obvious that a large evergreen could have blocked the view of the Albanese vehicle. In addition, there are awnings on the windows that block a significant portion of the windows. Finally, . . . there were window treatments that also blocked the view out of the house.

The thing Defendant's other photographs allegedly demonstrate is that the arrest did not take place directly in front of the witness's home. Relying on the distances given in the police report in tenths of a mile, the defense took photographs supporting the argument that the incident took place noticeably farther from the witness's house than the five yards estimated by the witness. The defense verifies the photographs through an affidavit from Defendant's wife.

Assuming the photographs depict what Defendant alleges, they do not add much to what the jury actually learned. While the photograph of the house shows the evergreen blocking much of the view, it also shows two, unobstructed windows. That is consistent with the witness's testimony. On cross-examination, he told the

jury about a "pretty big pine tree." But he explained, as suggested above, that he could see the road. He also told the jury that he moved to another window "for a better view." Again, the photographs support the witness. Otherwise, the awnings do not seem to obstruct the view at all. And, the window treatments appear merely to be curtains. It is highly unlikely that if Defendant had confronted the witness with the photographs, the witness would have agreed that the tree, the awnings, or the curtains blocked his view.

The other photographs, depicting the scene as too removed from the witness's home, are also not potentially helpful. Those photographs are misleading, based as they are on crude distance estimates found in a police report. To the extent Defendant attempts to back-up those photographs with his wife's affidavit, she swears: "Our vehicle was parked on the side of the road as depicted in Exhibit A." Exhibit A, however, is the photograph of the evergreen directly in front of the witness's home, not the other photographs taken from a distance. Thus, the affidavit does not support a claim that the other photographs are relevant, much less exculpatory. Furthermore, Mrs. Albanese was available and Defendant could have presented her testimony. He declined to do that, presumably because she would have been confronted on cross-examination with the highly incriminating things she told the police at the scene. Accordingly, Defendant's untimely attempt to rely on her affidavit is also unimpressive.

A final thing worth mention is that Defendant testified. So, the jury not only heard the young eyewitness's accusation, which was subject to vigorous and potentially effective cross-examination, it heard Defendant's potentially plausible explanations and his unequivocal denials, including his testimony that both the teenager's and the teenager's father's testimony was "mistaken." The jury also heard rebuttal testimony further challenging Defendant's credibility. Having watched him and the other witnesses testify, the jury could have viewed Defendant's denials as not credible. That was within the jury's province.

It is possible, therefore, based on all the evidence, that the jury was

convinced beyond a reasonable doubt that the explanation for what happened was that Defendant was not merely in physical control, he was actually driving home from a family gathering while under the influence of alcohol when the domestic occurred. In any event, as discussed above, the State presented eyewitness testimony that Defendant was in actual physical control of the vehicle. All this reenforces the belief that Defendant's photographs would not have helped at trial.

IV.

In closing, the court appreciates that there is a mandatory prison sentence associated with this conviction. The court also recalls that it had to make important rulings extemporaneously. Nevertheless, as mentioned, the court has reviewed its bench rulings and it remains satisfied with them. The court is further satisfied that another trial, the same as the first but including cross-examination based on Defendant's photographs, would produce the same result. There is no reason to re-summons the witnesses and seat a new jury. Thus, taking everything into account, a new trial is not in the interest of justice.[2]

V.

For the reasons provided from the bench and above, Defendant's Motion for a New Trial is ***DENIED***.

IT IS SO ORDERED.

Very truly yours,
/s/ Fred S. Silverman

FSS/lah
oc: Prothonotary (Criminal Division)
Investigative Services (for Sentencing Date)

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[2] *Starling v. State*, 882 A.2d 747, 756 (Del. 2005).